(3)

No. 90-655

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

FREEPORT-MCMORAN INC., *et al.*,
*Petitioners,*

v.

K N ENERGY, INC.,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## MOTION OF AMERICAN MINING CONGRESS FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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November 21, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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## MOTION OF AMERICAN MINING CONGRESS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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The American Mining Congress moves this Court for leave to file the attached brief *amicus curiae* pursuant to Rule 37.2 of the Rules of the Court. Respondent K N Energy, Inc., has refused to consent to the filing of a brief *amicus curiae*.

Founded in 1897, the American Mining Congress is an industry association that encompasses (1) producers of most of America's metals, coal, industrial and agricultural minerals; (2) manufacturers of mining and mineral processing machinery, equipment and supplies; and (3) engineering and consulting

firms and financial institutions that serve the mining industry. Petitioner Freeport-McMoRan is a member.

The American Mining Congress is both a clearinghouse for information and a coordinator for action on behalf of the mining industry in the nation's capital. It keeps its members informed on matters pending in Congress, the Executive Branch and independent agencies, and works for constructive policies that will best enable the mining industry to serve the needs of the nation. It also marshals the cooperative endeavors of mine operators and equipment manufacturers in the interest of health, safety and progress for everyone in the industry. In this regard, it vigorously promotes continuing modernization of mine operations and equipment to enhance safety, health, efficiency and product quality.

The members of the American Mining Congress operate in interstate commerce and from time to time litigate in the federal courts under diversity jurisdiction. Because they are involved in interstate commerce, members of the American Mining Congress are among the intended beneficiaries of federal diversity jurisdiction. "There is little doubt that the development of commerce has been aided by the existence of diversity jurisdiction . . . . " 1 J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, *Moore's Federal Practice* ¶ 0.71[3.—2] at 701.33. Accordingly, the members have a strong and abiding interest in ensuring the stability and predictability of federal diversity jurisdiction.



This Court should grant American Mining Congress' motion to file the attached brief *amicus* to demonstrate why the petition for a writ of certiorari should be granted.

Respectfully submitted,

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## QUESTION PRESENTED FOR REVIEW

Can federal diversity jurisdiction, properly established at the date the complaint was filed, be destroyed by the substitution or addition of a non-diverse, affiliated plaintiff?



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## BRIEF OF AMERICAN MINING CONGRESS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### INTEREST OF AMICUS CURIAE

The interest of the American Mining Congress as *amicus curiae* is set forth in the Motion for Leave to File Brief Amicus Curiae, p. i, *supra*.

## REASONS FOR GRANTING THE WRIT

### 1. The Tenth Circuit Erred In Ruling That Federal Diversity Jurisdiction Under 28 U.S.C. § 1332(a)(1), Established At The Date On Which The Complaint Was Filed, Can Be Destroyed By Subsequent Events.

Before the Court is a decision by the United States Court of Appeals for the Tenth Circuit holding that federal diversity jurisdiction, properly invoked under 28 U.S.C. § 1332(a)(1), is destroyed by the addition of a nondiverse party plaintiff, a corporate affiliate of the initial plaintiff. *See McMoRan Oil and Gas Co. v. K N Energy, Inc.*, 907 F.2d 1022 (10th Cir. 1990), Pet. App. A. This decision effectively overrules the longstanding principle of subject matter jurisdiction that "the jurisdiction of the court depends upon the state of things at the time of the action brought, and . . . after vesting, it cannot be ousted by subsequent events." *Mullen v. Torrance*, 22 U.S. (1 Wheat.) 537, 539 (1824). This decision, moreover, conflicts not only with a settled line of decisions by this Court beginning with *Mullen* and reaffirmed in *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957). It also conflicts with the law of every other circuit.

The material facts are not in dispute. When this action was filed more than five years ago, complete diversity existed between the parties. During the course of the litigation, which involved a contractual dispute, business conditions unrelated to the litigation caused petitioners to reorganize the structure of their affiliated entities. As part of this reorganization, petitioners transferred their interests in the properties at issue to an affiliated entity, a partnership whose limited partners included citizens in virtually every state, including the state where respondent was



a citizen. Subsequently, this limited partnership merged into another corporate affiliate, whose citizenship is diverse to that of respondent.

Thus, the parties agree that:

(1) The original parties were diverse;

(2) For the period during which the limited partnership owned the interests in the suit, the parties were not diverse;

(3) The parties are now again diverse owing to the final merger; and

(4) All mergers and transfers were undertaken for business reasons wholly unrelated to this case.

Upon these facts, the Tenth Circuit found that "although complete diversity was present when the complaint was filed, our inquiry now focuses on whether the addition of a party plaintiff . . . destroys the court's subject matter jurisdiction." *McMoRan*, 907 F.2d at 1024, Pet. App. 5a. This analysis overlooks clear doctrine that so long as "complete diversity was present when the complaint was filed," the addition or substitution of a party cannot ever "destroy[ ] the court's subject matter jurisdiction." *Id.*

Since 1824 in *Mullen v. Torrance*, *supra*, the rule that diversity jurisdiction is determined at the time the case is filed has sustained federal diversity jurisdiction where a change of domicile created diversity three days before the suit was filed, *see Splint Coal Corp. v. Anderson*, 109 F.2d 896 (6th Cir.), *cert. denied*, 311 U.S. 661 (1940), and where a move terminated diverse state citizenship within a week after the action was commenced, *see Truitt v. Gaines*, 318 F.2d 461 (3d Cir. 1963).

Over the years, this doctrine has only been broadened. Beginning with situations involving an individual simply changing citizenship, *see, e.g., Louisville N.A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U.S. 552 (1899), the rationale has been expanded to include situations in which a party dies and a nondiverse representative is substituted, *see Dunn v. Clarke*, 33 U.S. (8 Pet.) 1 (1834); where initial jurisdiction is secured through removal to federal court, *see Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 705 (1972); where the merger of corporations results in a change in a corporate party's citizenship, *Cottrell v. Bendix Corp.*, 914 F.2d 1494 (6th Cir. 1990); *Hoefferle Truck Sales, Inc. v. Divco-Wayne Corp.*, 523 F.2d 543 (7th Cir. 1975); where a nondiverse dispensable party intervenes, *see, e.g., Wichita R. & Light Co. v. Pub. Util. Comm'n*, 260 U.S. 48, 53-54 (1922); *American Nat'l Bank & Trust Co. of Chicago v. Bailey*, 750 F.2d 577, 582-83 (7th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985); and where a *pendente lite* transferee is substituted or joined pursuant to Fed. R. Civ. P. 25(c), *see Smith v. Sperling*, *supra*; *Hardenbergh v. Ray*, 151 U.S. 112, 118-19 (1894). *See generally* 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1951 at 523 (1986); 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3608 at 449 (1984 & Supp. 1990); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶¶ 25.05, 25.08 at 25-85 (1990) [hereinafter 3B *Moore's Federal Practice*]; 1 J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, *Moore's Federal Practice* ¶ 0.74[1] at 707.3 (1990 & Supp. 1990) [hereinafter 1 *Moore's Federal Practice*].



The Tenth Circuit in *McMoRan* never directly addresses whether properly vested diversity can be destroyed; thus it offers no rational basis for distinguishing or overruling this settled line of cases. Had it focused on the *Mullen* and *Smith* line of cases, the court would have recognized that the citizenship of the limited partnership is completely irrelevant. It is undisputed that the parties that initiated the litigation had the complete diversity of citizenship required by *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

In holding that diversity had been destroyed, the Tenth Circuit relied upon this Court's recent decision in *Carden v. Arkoma Assoc.*, 110 S. Ct. 1015 (1990). In *Carden* the Court held that the citizenship of all partners, general and limited, must be considered when determining federal diversity jurisdiction. *Carden* is inapposite. To be sure, had this case involved a nondiverse limited partnership as an original plaintiff, *Carden* would control. But *Carden* never addresses the question of when diversity of citizenship is evaluated for purposes of subject matter jurisdiction because the facts of *Carden* did not call upon the Court to render that decision.

It is true that "when the [*Carden* issue] was decided by the district court, the Circuits were divided over how to determine the citizenship of a limited partnership." *McMoRan*, 907 F.2d at 1024, Pet. App. 5a. But the issue in this case is not how to evaluate the citizenship of a limited partnership that files suit in diversity. Rather, the issue is whether diversity is lost when a corporate plaintiff merges into its affiliate, a

nondiverse limited partnership, and later merges into a diverse corporate parent.[1]

In *Dery v. Wyer*, 265 F.2d 804, 808 (2d Cir. 1959), the Second Circuit described the need for jurisdictional stability and certainty:

> [that] subsequent events will not work an ouster of jurisdiction . . . stems . . . from the general notion that the sufficiency of jurisdiction should be determined once and for all at the threshold and if found to be present then should continue until final disposition of the action.

This policy "minimizes repeated challenges to the court's subject matter 'jurisdiction,' " and "offers a uniform test that is relatively easy to apply." 13B C. Wright, A. Miller & E. Cooper, *supra*, § 3608 at 452.

This case stands as an example of the inefficiencies and waste that inhere in a contrary rule. After the courts and parties devoted over five years of time, energy, and expense to this litigation—three years of discovery and a full trial and judgment on the merits—the entire action has been dismissed. Moreover, on the facts of this case, petitioners can refile their claims in the federal court that has already decided the case once.

The rule below invites manipulation and abuse by litigants. Litigants preferring state court, for whatever reason and at any stage of the litigation, could

[1] The Tenth Circuit's analysis, moreover, is internally inconsistent in that it considers only the transfer of interest to the limited partnership. If subsequent events can ever destroy diversity, subsequent events, by that same reasoning, should be able to cure the lack of diversity.



take action that fairly casts doubt on diversity. The technique of diversity manipulation would become yet another litigation tactic. *Cf. id.* Moreover, such a rule would require parties to a protracted litigation, like the ones in this case, to make organizational or citizenship decisions based not upon commercial needs, but upon the exigencies of litigation. The policy that in part underlies diversity jurisdiction—promoting interstate commerce—would thereby be undercut. *See generally* 1 *Moore's Federal Practice*, *supra*, § 0.71 [3.—2], at 701.33.

**2. The Tenth Circuit's Erroneous Jurisdictional Ruling Is Contrary To The Law In Every Other Circuit, And Thus Requires Supreme Court Intervention To Promote Uniform Federal Jurisdiction.**

The Tenth Circuit's decision in this case puts it squarely at odds with decisions in every other circuit. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 109 S. Ct. 2218, 2222 (1989) (resolving circuit disputes).

Every federal court of appeals has ruled, until this point, that valid federal jurisdiction between the original parties is not affected by subsequent events such as the change of citizenship of a party, or the substitution or addition of a party under Fed. R. Civ. P. 25. *See, e.g., Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 670 (1st Cir. 1979); *In re Agent Orange Prod. Liability Litigation*, 818 F.2d 145 (2d Cir. 1987); *Brough v. Strathmann Supply Co.*, 358 F.2d 374 (3d Cir. 1966); *Goldsmith v. Mayor & City Council of Baltimore*, 845 F.2d 61 (4th Cir. 1988); *Zurn Indus., Inc. v. Acton Constr. Co.*, 847 F.2d 234 (5th Cir. 1988); *Dean v. Holiday Inns, Inc.*, 860 F.2d 670, 672 (6th Cir. 1988); *Hoefferle Truck Sales, Inc.*, *supra*; *Yeldell v. Tutt*, 913 F.2d 533, 537 (8th Cir.

1990); *Blakemore v. Missouri P.R. Co.*, 789 F.2d 616, 618 (8th Cir. 1986); *Hutchinson v. United States*, 677 F.2d 1322, 1326 n.3 (9th Cir. 1982); *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553 (11th Cir. 1989); *Prakash v. American University*, 727 F.2d 1174, 1179 n.28 (D.C. Cir. 1984); *Beghin-Say Int'l Inc. v. Ole-Bendt Rasmussen*, 733 F.2d 1568 (Fed. Cir. 1984).

Respondent below relied on a line of cases spawned by *Grady v. Irvine*, 254 F.2d 224 (4th Cir.), *cert. denied*, 358 U.S. 819 (1958). In *Grady*, the plaintiff brought a personal injury action under the court's federal diversity jurisdiction. After his death, his non-diverse estate was substituted as the plaintiff and the complaint was converted to a wrongful death action. 254 F.2d at 226. The court held diversity was destroyed. But as the court makes clear, the loss of diversity was owing to the change in the cause of action. "There is a great difference . . . between a formal substitution of a personal representative to prosecute the action *in aid of the same right asserted* by his decedent and an amendment . . . *which changes the nature of the right asserted* and alters the substance of the action." *Id.* (emphasis added). *See also Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

Thus, *Grady* is inapplicable. This case involves no change in the nature of the right asserted, as required by *Grady*. All that changed was the owner of the interest in the litigation. There is no material difference between this case and *Smith v. Sperling*, *supra*.

The other circuits are thus in agreement that federal jurisdiction is (1) determined at the time the suit begins; and (2) unaffected by subsequent events that



do not alter the underlying cause of action. No court or commentator has suggested directly or indirectly until now that diversity jurisdiction, properly established at the outset of an action, could be destroyed by subsequent events surrounding that same action. The Court should grant the writ of certiorari to avoid disturbing this "deeply rooted understanding . . . particularly when requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Newman-Green*, 109 S. Ct. at 2225 (citing *Mullaney v. Anderson*, 342 U.S. 415 (1952)).

## CONCLUSION

For the reasons presented, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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